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No. 05-1157

IN THE

# Supreme Court of the United States

CREDIT SUISSE SECURITIES (USA) LLC, fka
CREDIT SUISSE FIRST BOSTON LLC, *et al.*,

*Petitioners*,

*v.*

GLEN BILLING, *et al.*,

*Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## MOTION OF NYSE GROUP, INC. FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS AND BRIEF *AMICUS CURIAE*

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## MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS CREDIT SUISSE FIRST BOSTON LTD., *ET AL.*

NYSE Group, Inc. (with its subsidiaries, the "NYSE Group") hereby respectfully moves, pursuant to Supreme Court Rule 37.2, for leave to file the attached brief as *amicus curiae* in this case in support of the Petitioners Credit Suisse First Boston Ltd., *et al.* (the "Petitioners"). The consents of counsel for the Petitioners and Respondents Billing, *et al.* have been obtained.[1] The consent of counsel for Respondents Pfeiffer, *et al.*, was requested but not obtained.

The NYSE Group operates two securities exchanges, the New York Stock Exchange LLC ("NYSE") and NYSE Arca, Inc ("NYSE Arca"). The NYSE is the world's largest and most liquid cash equities market, listing operating companies with a total global market capitalization of $25 trillion. NYSE Arca is an all-electronic stock exchange.

NYSE and NYSE Arca are registered with the Securities and Exchange Commission ("SEC") as national securities exchanges and self-regulatory organizations ("SROs") within the meaning of Section 3 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78c(a)(26). The Exchange Act both authorizes and requires SROs to promulgate and enforce rules governing their membership and the conduct of members, member organizations and their employees, 15 U.S.C. §§ 78f(b)(1)-(9), 78s(g), as well as "to remove impediments to and perfect the mechanism of a free and open market . . . and, in general, to protect investors and the public interest." 15 U.S.C. § 78f(b)(5).

1. The written consent is being filed with the Clerk of the Court contemporaneously herewith.

The NYSE Group's performance of its regulatory and general oversight functions are protected by the doctrine of absolute immunity. See, *e.g.*, *D'Alessio* v. *New York Stock Exchange, Inc.*, 258 F.3d 93, 106 (2d Cir. 2001). In addition, with regard to the doctrine of implied immunity, the Court of Appeals stated that "a self-regulatory organization enjoy[s] a special status that [securities market participants] cannot claim." *Billing* v. *Credit Suisse First Boston, Ltd*, 426 F.3d 130, 171 (2d Cir. 2005). Nevertheless, the decision of the Second Circuit is of serious concern to the NYSE Group in a way that reaches well beyond the result of this particular case.

The decision announces a standard for implied antitrust immunity in that industry that is vague and indeterminate, and explicitly disregards the scope of the SEC's authority. As a result, market participants will be unable reasonably to predict whether potential courses of conduct may subject them to antitrust claims for treble damages and joint and several liability. Therefore, market participants are likely to refrain from engaging in collaborative efforts necessary to make the securities industry operate efficiently. See *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (expressing concern of over-deterrence if antitrust intervention is allowed in the context of a regulatory regime); *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 691 (1975) (implied antitrust repeal applies when "necessary to make the Exchange Act work as it was intended. . . .").

The NYSE Group's interest is in the confirmation by the Court of a standard for implied repeal as applied in the securities industry that is reasonably clear to industry participants and thus allows the securities regulatory regime, and securities industry regulators, to function in the manner intended by Congress.

Respectfully submitted,

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NYSE Group, Inc. (with its subsidiaries, the "NYSE Group") respectfully submits this brief as amicus curiae.[1]

## INTEREST OF AMICUS CURIAE

The NYSE Group operates two securities exchanges, the New York Stock Exchange LLC ("NYSE") and NYSE Arca, Inc. ("NYSE Arca"), an all-electronic stock exchange. The NYSE is the world's largest and most liquid cash equities market, listing operating companies with a total global market capitalization of $25 trillion. For more than 200 years, this exchange has provided a reliable, orderly, liquid, and efficient marketplace for investors and traders to buy and sell securities.

NYSE and NYSE Arca are registered with the Securities and Exchange Commission ("SEC") as national securities exchanges and self-regulatory organizations ("SROs") within the meaning of Section 3 of the Securities Exchange Act of 1934 ("Exchange Act"), 15 U.S.C. § 78c(a)(26). The Exchange Act both authorizes and requires SROs to promulgate and enforce rules governing their membership and the conduct of members, member organizations and their employees, 15 U.S.C. §§ 78f(b)(1)-(9), 78s(g), as well as "to remove impediments to and perfect the mechanism of a free and open market . . . and, in general, to protect investors and the public interest." 15 U.S.C. § 78f(b)(5).

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1. Petitioners and Respondents Billing, *et al.*, have consented to the NYSE Group, Inc.'s participation as amicus curiae, and letters of consent are filed concurrently with the Clerk of the Court. The consent of Respondents Pfeiffer, *et al.*, has been requested but not obtained. No counsel for any of the parties authored this brief, in whole or in part, and no one other than amicus made a monetary contribution to its preparation or submission.

The NYSE Group's performance of its regulatory and general oversight functions is protected by the doctrine of absolute immunity. See, e.g., *D'Alessio v. N.Y. Stock Exch., Inc.*, 258 F.3d 93, 106 (2d Cir. 2001). In addition, with regard to implied repeal of the antitrust laws, the Court of Appeals stated that "a self-regulatory organization enjoy[s] a special status that [securities market participants] cannot claim." *Billing v. Credit Suisse First Boston, Ltd.*, 426 F.3d 130, 171 (2d Cir. 2005). Nevertheless, the NYSE Group has a vital interest in the Court's articulation of a test for implied antitrust repeal that supports the effective operation of the regulatory scheme adopted by Congress in the Exchange Act and allows participants in the securities markets ("market participants") reasonably to predict whether the antitrust laws will apply to their activities.

## SUMMARY OF ARGUMENT

The doctrine of "implied repeal" or "implied immunity" acts to repeal the antitrust laws in certain contexts to allow regulatory schemes to operate as intended by Congress. *United States v. NASD*, 422 U.S. 694, 735 (1975) ("[W]e have implied immunity in particular and discrete instances to ensure that the federal agency entrusted with regulation in the public interest could carry out its responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws."). Any analysis of implied repeal thus turns on the structure, history, and goals of the particular regulatory scheme involved. See *Phonetele, Inc. v. Am. Tel. & Tel. Co.*, 664 F.2d 716, 727 (9th Cir. 1981) (Kennedy, J.).

The regulatory regime for the securities industry reflects Congress' understanding that the "security markets ... are

as sensitive as a hair trigger," and affect "the economic machinery of the whole country. . . ." H.R. Rep. No. 73-1383, p. 4 (1934). As a result, the Exchange Act provides the SEC with substantial flexibility and discretion to tailor appropriate solutions to industry issues, and to change its policies as circumstances, and/or its regulatory analysis, evolve. In contrast, the antitrust laws focus solely on competition, not the broad array of factors (including competition) that Congress has mandated the securities regulators to consider, and provide for the blunt remedy of treble damages, rather than the more supple remedial plan of the Exchange Act.

In order to promote the goals of the securities regulatory scheme, collaboration among industry participants can be necessary. Because the antitrust laws often regard collaboration among competitors with suspicion, such conduct is a ripe target for antitrust lawsuits. The potential for such litigation, in turn, can deter such collaborative activity even if it would further the goals of the regulatory regime, and thus conflicts with the operation of the regulatory scheme.

To allow the securities regulatory plan to function as Congress intended, the Court should articulate a standard for implied repeal in this industry that avoids such over-deterrence and (in contrast to the approach of the Court of Appeals) provides industry participants with reasonable clarity by which to assess whether contemplated conduct would be subject to antitrust attack. In particular, that standard should (1) turn on the potential for interference with the workings of the industry regulatory scheme, not actual conflict between the conduct alleged and a particular current regulation, and (2) be sufficiently broad in its application to the field of conduct at issue to protect against dilution of the benefits of the doctrine through efforts at artful pleading.

## ARGUMENT

### I. Clear Articulation And Application Of The Implied Repeal Doctrine In The Securities Industry Is Necessary To Allow The Industry's Regulatory Scheme To Operate As Congress Intended

#### A. Implementation of the Doctrine of Implied Repeal Is Specific to the Particular Regulatory Scheme at Issue

The doctrine of implied antitrust repeal is based on concern that a Congressionally-established regulatory scheme can not operate as intended when antitrust courts, with their different standards and remedies, add another layer of oversight to a highly-regulated industry. In particular, the Court has held that the antitrust laws do not apply where "necessary to make the Exchange Act work as it was intended. . . ." *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 691 (1975).

Because the relevant question is the impact of antitrust scrutiny on the functioning of the regulatory system, the application of the implied repeal doctrine is specially tailored to the particular nature of each regulatory scheme. See *Phonetele*, 664 F.2d at 727 ("Each of the Supreme Court's [implied repeal] cases is decisively shaped by considerations of the special aspects of the regulated industry involved."). Indeed, the Court's application of the implied repeal doctrine in the securities industry has varied over time as Congress has amended its securities regulatory scheme. Compare *Silver v. N.Y. Stock Exch.*, 373 U.S. 341, 360 (1963) (finding no implied repeal based on regulatory scheme prior to 1975 amendments to the Exchange Act, which made no provision

for SEC or judicial review of exchange conduct at issue) with *Gordon*, 422 U.S. at 685 (finding implied repeal; decided after the 1975 amendments to the Exchange Act, which, *inter alia*, provided for SEC and judicial review of certain exchange conduct).

### B. Congress' Regulatory Scheme for the Securities Industry Reflects the "Hair Trigger" Nature of Securities Markets, and Is Distinguished by Its Structure, Its Flexibility, and the Ongoing Need for Collaboration Among Industry Participants

In crafting its securities regulatory scheme in the wake of the 1929 Wall Street crash and the ensuing Great Depression, S. Rep. No. 73-792, p. 3 (1934), Congress recognized that "security markets . . . are as sensitive as a hair trigger," and affect "the economic machinery of the whole country. . . ." H.R. Rep. No. 73-1383, p. 4 (1934). It thus created for the securities industry "a unique pattern of regulation combining both industry and government responsibility." H.R. Rep. No. 94-123, p. 48 (1975).

One unique aspect of securities regulation is the Exchange Act's tiered approach to regulation, which delegates authority to SROs to act as the front line of enforcing compliance with "legal and ethical standards," with the SEC overseeing the activities of the SROs. See H.R. Rep. No. 94-123, p. 48 (1975). As Justice Douglas stated when he was SEC Chairman, Congress intended to allow the SROs to "take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope that it would never have to be used." W. Douglas, Democracy and Finance, 82 (Allen ed. 1940),

quoted in *Silver*, 373 U.S. at 352. The courts serve as an ultimate check in the system, empowered by Congress to review SEC action. See Section 25 of the Exchange Act, 15 U.S.C. § 78y.

The Exchange Act provides substantial flexibility to these regulators when applying their expertise to this sensitive, highly-nuanced, and ever-changing industry. Congress did not design the Exchange Act as a comprehensive list of statutory prohibitions or mandates, but instead granted the SEC sufficient discretion to avoid both "unworkable 'straight-jacket' regulation," on the one hand, and "loopholes which may be penetrated by slight variations in the method of doing business," on the other. S. Rep. No. 73-792, p. 5 (1934). The statute authorizes the SEC "to promulgate rules ... which define permissible conduct of brokers and dealers and establish standards for trading in securities to insure the fairness and orderliness of the securities markets." H.R. Rep. No. 94-123, p. 48 (1975). For example, Section 9(a)(6) of the Exchange Act, 15 U.S.C. § 78i(a)(6), forbids only stabilization of securities prices that is "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." See also 15 U.S.C. § 78i(b) (prohibiting options transactions that are in breach of "such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors").

In exercising its authority, the SEC is obliged to consider and weigh both competition and an array of other regulatory factors, such as protection of investors, prevention of fraudulent and manipulative acts and practices, and promotion of just and equitable principles of trade. See, e.g.,

*Gordon*, 422 U.S. at 689 ("[T]he SEC must consider, in addition [to competition], the economic health of the investors, the exchanges and the securities industry."); Section 19(f) of the Exchange Act, 15 U.S.C. § 78s(f) (addressing "any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter"); see also Section 6(b)(5) of the Exchange Act, 15 U.S.C. § 78f(b)(5) (requiring SROs to adopt rules that are

> designed to prevent fraudulent and manipulative acts and practices, to promote just and equitable principles of trade, to foster cooperation and coordination with persons engaged in regulating . . . and facilitating securities transactions, to remove impediments to and perfect the mechanism of an open market and a national market system, and, in general, to protect investors and the public interest . . .

Section 6(b)(8) of the Exchange Act, 15 U.S.C. § 78f(b)(8) (requiring SRO rules not to impose "any burden on competition not necessary or appropriate in furtherance of the purposes of this chapter").

The SEC evaluates these factors over time, as the industry — and/or the SEC's analysis of the most effective regulatory approach to a matter — change. For example, in contrast to the current situation, in which commission rate-fixing generally is prohibited, commission rates once were, with SEC approval, set by agreement among SROs and brokers. See *Gordon*, 422 U.S. at 662-67. Similarly, although agreements to list equity options on only one exchange are now prohibited, "the SEC [at one time] approved a plan, formulated by the exchanges jointly, for the single, or

exclusive, listing of any new equity option." *In re Stock Exchs. Options Trading Antitrust Litig.*, 317 F.3d 134, 140 (2d Cir. 2003).

The Exchange Act also provides the SEC with a broad and pliant array of measures to enforce its rules and policies, ranging from censure to the permanent bar of a person from acting as an officer or director of an issuer of securities, as well as fines.[2] This substantive and remedial flexibility permits the SEC and SROs to act with precision when crafting solutions to industry issues.

In some cases, such issues may best be addressed through collaboration among industry participants. The Exchange Act thus "enables the [SEC] to require joint activity that otherwise might be asserted to have an impact on competition, where the activity serves the public interest and the interests of investors." SEC Release No. 34-42914, 72 S.E.C. Docket 1493, 2000 WL 816861 (June 13, 2000).[3] See also Section

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2. See 15 U.S.C. § 78o(b)(f) (SEC may censure regulated entities including broker-dealers); 15 U.S.C. § 78u(d)(1) (authorizing the SEC to seek injunctive relief whenever it appears that a person "is engaged or is about to engage in acts or practices [constituting]" a violation of the Exchange Act or regulations promulgated thereto); id. § 78u(d)(3) (permitting the SEC to impose a range of fines for violation of the Exchange Act); id. § 78u(d)(2) (authorizing the court through an SEC enforcement action to "prohibit, conditionally or unconditionally, and permanently or for such period of time as it shall determine, any person who" used or employed any manipulative or deceptive device or contrivance "from acting as an officer or director" of an issuer of securities); 15 U.S.C. § 78u-3 (cease-and-desist proceedings).

3. See also SEC Release No. 34-44177, 74 S.E.C. Docket 1598, 2001 WL 366389 (April 12, 2001) (instituting a joint industry plan for reporting market center information to the public, which resulted from (Cont'd)

6(b)(5) of the Exchange Act, 15 U.S.C. § 78f(b)(5) (requiring the rules of an SRO to foster "coordination and cooperation" between persons engaged in regulating and facilitating securities transactions).

Indeed, the very nature of the regulatory plan embodied in the statute contemplates collaboration among market participants. See Section 6 of the Exchange Act, 15 U.S.C. § 78f (contemplating collaboration among market participants to form national securities exchanges); see also *Silver*, 373 U.S. at 360 ("The entire public policy of self-regulation, beginning with the idea that the Exchange may set up barriers to membership, contemplates that the Exchange will engage in restraints of trade which might well be unreasonable absent sanction by the Securities Exchange Act").

The need for securities industry collaboration remains a strong feature of today's regulatory regime. For instance, the SEC has "support[ed] industry initiatives to improve the operation of the clearance and settlement system," and in particular the development of straight-through processing, which was spearheaded by the Securities Industry Association, an organization comprised of over 600 securities firms. SEC Release No. 33-8398, 82 S.E.C. Docket 1198, 2004 WL 482332 (Mar. 11, 2004). The SEC also permits market participants to issue joint privacy notices to

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(Cont'd)

the SEC's "direct[ing] the [SROs] that trade national market system securities to act jointly in establishing procedures for market centers to follow in making their monthly reports available to the public in a uniform, readily accessible, and usable electronic format").

consumers in order to comply with their notice obligations under the Gramm-Leach-Bliley Act. See SEC Release No. 34-42974, 72 S.E.C. Docket 1694, 2000 WL 797443 (June 22, 2000).

Collaboration by almost 400 broker-dealers and other industry participants was necessary to conduct industry-wide testing to ensure that computer systems would not be adversely affected by the advent of the Year 2000, which the SEC considered an "extremely serious issue." SEC Release No. 34-41661, 70 S.E.C. Docket 455, 1999 WL 548567 (July 27, 1999). Similarly, the NYSE has encouraged its members to participate in industry-wide collaboration in testing their business continuity planning systems. See NYSE Info. Memo No. 05-80, 2005 NYSE Info. Memo LEXIS 80 (Oct. 13, 2005) ("[b]usiness continuity planning decisions made by one institution may affect ... the very functioning of the financial markets.... because of the broad interdependence among industry participants") (citation omitted).

The SEC also found collaboration among SROs to be necessary to implement the conversion of listed securities prices from fractions to decimals. See SEC Release No. 34-42914, 72 S.E.C. Docket 1493, 2000 WL 816861 (June 13, 2000) (requiring SROs "to act jointly in planning, discussing, developing, and submitting to the Commission a plan that will begin phasing in the implementation of decimal pricing in equity securities and options on or before September 5, 2000."). Likewise, collaboration was found necessary for the creation and ongoing viability of the system of options price reporting established through the Options Price Reporting

Authority ("OPRA").[4] Without the SEC's ability to foster such collaboration, these and other important goals of the regulatory scheme may never have been accomplished.

### C. The Substantive and Remedial Approaches of the Antitrust Laws Contrast Markedly With Those of the Securities Regulatory Scheme

In contrast to the flexibility that is the hallmark of the Congressional design for the securities regulatory scheme, the antitrust laws are narrowly focused on one goal — competition. See *Gordon*, 422 U.S. at 689 ("The sole aim of antitrust legislation is to protect competition. . . ."). Moreover, antitrust courts by their very nature cannot possess a regulator's intimate familiarity with the issues and needs of the securities industry. And the SEC's ability to select precise corrective measures from a menu of alternatives contrasts sharply with the sledgehammer of requested treble damages awards that are an important feature of antitrust cases. 15 U.S.C. § 15(a).

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4. SEC Release No. 34-51716, 85 S.E.C. Docket 1260, 2005 WL 2043751 (May 19, 2005)

> The OPRA Plan is a national market system plan approved by the Commission pursuant to Section 11A of the Act and Rule 11Aa3-2 thereunder. http://www.opradata.com. The OPRA Plan provides for the collection and dissemination of last sale and quotation information on options that are traded on the participant exchanges. The six participants to the OPRA Plan are the American Stock Exchange LLC, the Boston Stock Exchange, Inc., the Chicago Board Options Exchange, Inc., the International Securities Exchange, Inc., the Pacific Exchange, Inc., and the Philadelphia Stock Exchange, Inc.

Further, the antitrust laws often regard collaboration among competitors with suspicion. See *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (holding per se illegal an agreement among members of professional association to restrict advertising, and observing that the policy underlying the Sherman Act "precludes inquiry into the question whether competition is good or bad"); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 396-401 (1927) (naked price-fixing agreements between competitors are per se unlawful, regardless of whether the price fixed is reasonable). Even when ultimately defensible, such collaboration can become a target of lengthy antitrust litigation, with the potential for expensive, time-consuming discovery, treble damages, joint and several liability with no statutory right of contribution, and the attendant pressure to settle.

As a result, if market participants cannot reasonably gauge whether the implied repeal doctrine will apply in a particular situation, they may well refrain from participating in collaborative conduct, even if such behavior would, in the view of the securities regulators, be beneficial to investors, the industry, and the national economy. Indeed, because of fears of antitrust scrutiny, even certain SROs were reluctant to collaborate to achieve a joint solution to a significant issue in the securities industry (converting prices of exchange listed securities from fractions to decimals) without an order from the SEC explicitly authorizing such collaboration. See SEC Release No. 34-42914, 72 S.E.C. Docket 1493, 2000 WL 816861, n.27 (June 13, 2000) ("The Participants previously requested that, to address concerns about antitrust liability, the Commission order them to work together to coordinate decimal planning.").

Such over-deterrence is plainly repugnant to the operation of the securities regulatory regime. *NASD*, 422 U.S. at 720; cf. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("[M]istaken inferences [of impermissible collaboration by an antitrust court] are especially costly, because they chill the very conduct the antitrust laws are designed to protect.") (quoted in *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004) (antitrust repeal applies "to avoid the real possibility of judgments conflicting with the agency's regulatory scheme 'that might be voiced by courts exercising jurisdiction under the antitrust laws'") (quoting *NASD*, 422 U.S. at 734)). Thus, for Congress' securities regulatory scheme to function properly without the intrusive chill of the antitrust laws, there must be a clear standard, and clear implementation of that standard, as to when the antitrust laws apply in this industry.

## II. As Implemented In The Securities Industry, The Doctrine Of Implied Repeal Should Turn On The Potential For Conflict With The Operation Of The Regulatory Scheme As Applied To The Field Of Conduct Involved In The Case

### A. The Court of Appeals' Approach Conflicts with Prior Decisions of the Court and Provides No Reasonable Guidance to Industry Participants

The Court of Appeals observed that the parties generally agreed that "potential specific conflict" implied repeal applies "to whatever conduct the SEC could permit under its regulatory regime," *Billing*, 426 F.3d at 167, but disagreed as to the application of that standard to this case. Id. The Court of Appeals nevertheless rejected that framework, and

instead propounded an "all the facts and circumstances" balancing test, informed by five criteria, including "any other evidence":

> We will apply immunity if we determine that Congress contemplated the specific conflict and intended for the antitrust laws to be repealed. That determination is informed by considering (1) congressional intent as reflected in legislative history and a statute's structure; (2) the possibility for conflicting mandates; (3) the possibility that application of the antitrust laws would moot a regulatory provision; (4) the history of agency regulation of the anticompetitive conduct; and (5) any other evidence indicating that the statute implies a repeal.

*Id.* at 164-65. In particular, the Court of Appeals held that it did not need to decide the scope of the SEC's authority over the conduct at issue to determine whether implied repeal applied. Id. at 168 ("We need not resolve the bounds of SEC authority.").

This approach conflicts with the decisions of the Court, which focus on (1) exactly the questions of the existence and exercise of SEC authority that the Court of Appeals eschewed, and (2) the differing standards employed by the antitrust laws (typically limited to competitive effects) and the Exchange Act (considering competition plus other regulatory criteria). In *Silver*, the Court declined to imply repeal because, prior to the 1975 amendments to the Exchange Act, the SEC lacked the authority to review an SRO's termination of a non-member's direct wire connections to members. *Silver*, 373 U.S. at 357-58. The

Court twice noted that "a different case" would exist if such review (including review of competitive implications) were available. Id. at 358 n.12, 360. In *Gordon*, the Court held implied repeal applicable where the SEC had, and had exercised, such power of review with regard to the fixing of commission rates, and imposition of the antitrust laws would "subject the exchanges and their members to conflicting standards." *Gordon*, 422 U.S. at 689-91. The Court reached this conclusion even though, at the time of its decision, the SEC prohibited the fixing of commissions. Id. at 690-91.

The Court of Appeals' decision also conflicts with the Court's decision in *NASD*, by allowing implied repeal on the ground of "pervasive regulation" to apply to market participants only where it would be "derivative" of implied repeal that applied to an SRO. *Billing*, 426 F.3d at 160-61. The Court in *NASD* did not so restrict this ground for implied repeal. There, the government alleged that the NASD and certain mutual funds, underwriters and broker-dealers had agreed to restrict the sale and fix the prices of mutual fund shares, in violation of the Sherman Act. *NASD*, 422 U.S. at 734-35. The Court acknowledged that the conduct at issue was "neither required . . . nor authorized" under the securities laws. Id. at 730. It nevertheless noted the "broad regulatory authority conferred upon the SEC" in the area, id. at 734, and concluded that, in the context ~~of the~~ "pervasive regulatory scheme," implied repeal was applicable to all defendants, without distinguishing between SRO and market participants, because they otherwise could be subject to "duplicative and inconsistent standards" by the concurrent application of the antitrust and the securities laws, which was "hardly a result that Congress would have mandated." Id. at 735.

The defects in the approach of the Court of Appeals are highlighted, not avoided, by its willingness to consider a variety of regulatory factors in assessing the propriety of securities industry conduct under antitrust rule of reason analysis. *Billing*, 426 F.3d at 165-66. By proposing the availability of such a modified rule of reason, the Court of Appeals recognized the inadequacy of the traditional, "competition-only" antitrust analysis in the context of the securities industry. See id. at 165. However, by placing this Exchange Act-like evaluation in the hands of an antitrust court rather than the SEC, the Court of Appeals disregarded an integral part of Congress's regulatory plan recognized by the Court in *NASD* – that the SEC should be making such decisions, not courts. See *NASD*, 422 U.S. at 734 (implied repeal necessary in order to "assure that the federal agency entrusted with regulation in the public interest could carry out that responsibility free from the disruption of conflicting judgments that might be voiced by courts exercising jurisdiction under the antitrust laws.").

Moreover, the Court of Appeal's approach — involving multiple factors, including the vague "any other evidence" criterion, and no structure for analysis —provides no reasonable guidance to market participants, and thus deprives them of any ability reasonably to predict whether potential courses of conduct would subject them to antitrust attack. Particularly given the treble and joint and several nature of antitrust conspiracy damages claims, such uncertainty is likely to cause exactly the over-deterrence and regulatory disruption against which the Court warned recently in *Verizon Communications*, 540 U.S. at 414.

### B. Implied Repeal Should Focus on the Potential for Conflict with the Workings of the Regulatory Scheme and Prevent Disruption of that Scheme by Artful Pleading

In contrast, the Court's implied repeal decisions in the securities context outline an approach that affords industry participants the reasonable clarity necessary to support the regulatory scheme. Those decisions reflect the principle that implied repeal applies where the SEC is empowered to regulate, and has been involved in regulating, a field of conduct (e.g., setting of commission rates). Under such circumstances, application of the antitrust laws, with their limited goal (solely of protecting competition), and different means of accomplishing that goal, would create an impermissible potential for conflict with the operation of the Congressionally-enacted regulatory scheme. See *Gordon*, 422 U.S. at 689-90; cf. *Silver*, 373 U.S. at 357-58. See also *Options*, 317 F.3d at 149 (after reviewing *Silver*, *Gordon* and *NASD*, concluding that "the proper focus is . . . on the Commission's authority to permit conduct that the antitrust laws would prohibit.")

This principle does not hinge on the specific approach of the securities regulators at a given time;[5] implied repeal focuses on vindicating the "regulatory system," as devised by Congress, not a particular outcome of that system at a particular moment. *NASD*, 422 U.S. at 720. Thus, in *Gordon*, the Court found implied repeal even though the SEC prohibited the conduct at issue (fixing of commission rates) at the time of the Court's decision. *Gordon*, 422 U.S. at 690-

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5. Contra *Billing*, 426 F.3d at 170 ("The conduct alleged in this case, clearly, is not permitted under SEC regulations.").

91. See also *Options*, 317 F.3d at 142 (finding implied repeal even though, at the time of the decision, the SEC prohibited agreements restricting the listing of equity options to one exchange). This approach is necessary to allow the regulatory system to operate as Congress intended — with the securities regulators re-assessing the impact of conduct under the array of considerations applicable under the Exchange Act as circumstances and/or regulatory analysis change, making distinctions based on the interplay of all those factors (not just competition), and crafting remedial measures with the finely-tuned instrument provided by the Exchange Act, not the cudgel of treble damages.

Finally, to provide the clarity necessary to avoid over-deterrence and vindicate the regulatory scheme, the Court should not only confirm the standard embodied in its earlier decisions, as described supra, it should also implement that standard in a way that covers the full scope of the subject matter at issue (e.g., commission setting, options listing, IPO practices), and not allow the application of implied repeal to turn on fine distinctions between types of alleged behavior within that subject matter, around which distinctions a plaintiff might plead to try to avoid application of the doctrine.

The principle underlying implied repeal — protection against interference with the operation of the regulatory system — does not turn on the nature of the particular alleged behavior challenged within the regulated subject matter; it turns on the Congressional plan for regulation of the subject matter. The purpose of the doctrine would be undermined if plaintiffs could evade it merely by artful pleading.

## CONCLUSION

NYSE Group respectfully submits that the Court should reverse the decision of the Court of Appeals, and confirm a standard for implied repeal as applied in the securities industry that is reasonably clear to industry participants and allows the securities regulatory regime to function in the manner intended by Congress.

Respectfully submitted,

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